

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re)
)
HICKS BROADCASTING)
OF INDIANA, LLC)
)
Order to Show Cause Why the License for)
FM Radio Station WRBR(FM),)
South Bend, Indiana, Should Not Be Revoked;))
)
AND)
)
PATHFINDER COMMUNICATIONS CORP.)
)
Order to Show Cause Why the License for)
FM Radio Station WBYT(FM),)
Elkhart, Indiana, Should Not Be Revoked;)

MM Docket No. 98-66

JOINT PARTIES'
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Roy J. Stewart,
Chief, Mass Media Bureau
Norman Goldstein
Chief, Complaints and Political Programming Branch
James W. Shook
Roy W. Boyce
Kathryn S. Berthot
Attorneys, Mass Media Bureau

William Crispin, Esq.
Dean Brenner, Esq.
Crispin & Brenner, PLLC
Attorneys for Niles Broadcasting, Inc.

Erwin G. Krasnow, Esq.
Douglas W. Hall, Esq.
Eric T. Werner, Esq.
Verner, Liipfert, Bernhard,
McPherson & Hand
Attorneys for Hicks Broadcasting of
Indiana, LLC

Eric L. Bernthal, Esq.
Everett C. Johnson, Jr., Esq.
Michael J. Guzman, Esq.
Allen M. Gardner, Esq.
Latham & Watkins
Attorneys for Pathfinder
Communications Corp.

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March 8, 1999

Summary

This proceeding was initiated to determine whether the licenses for radio stations WRBR(FM), South Bend, Indiana, and WBYT(FM), Elkhart, Indiana, should be revoked. The question as to revocation existed because information before the Commission at the time the Order to Show Cause was adopted raised questions about the character of Hicks Broadcasting of Indiana, LLC ("Hicks/Indiana") principal, David L. Hicks ("Hicks") and of Pathfinder Communications Corp. ("Pathfinder") principal, John F. Dille, III ("Dille"). Additionally, questions were raised as to whether Pathfinder controlled Hicks, and, if so, when such control was acquired.

Based on a thorough assessment of the evidence, the parties believe that revocation is inappropriate. The evidence reflects that neither Hicks nor Dille engaged in deceit with respect to submissions made to the Commission in connection with Hicks/Indiana's application to acquire WRBR(FM). To the extent that the application and related materials did not convey the full story about Dille's role and that of Pathfinder in the proposed financing and operation of WRBR(FM), the parties have concluded that the evidence shows that any such omissions resulted from mistakes and misunderstandings, not deceit. Thus, the parties, including the Bureau, believe that both Hicks and Pathfinder have the requisite character to remain licensees.

Following the close of the hearing, the parties engaged in extensive negotiations and entered into a settlement, agreeing to submit joint Findings of Fact and Conclusions of Law proposing to resolve all issues related to this proceeding. The Proposed Findings of Fact and Conclusions of Law are the product of compromise and concession on the part of all the parties. The parties have agreed, for settlement purposes, to the entry of the Proposed

Findings of Fact and Conclusions of Law and an imposition of forfeitures in the amounts set forth therein. The Bureau and the private parties agree that the Proposed Findings of Fact and Conclusions of Law represent a just and appropriate result in the public interest. If the Presiding Judge is not persuaded to adopt these joint Proposed Findings of Fact and Conclusions of Law, the parties request leave to submit supplemental Proposed Findings of Fact and Conclusions of Law which reflect their respective points of view.

In view of the significant impact this proceeding has had on the business of Pathfinder - - specifically, a freeze on its ability to acquire and sell broadcast properties during its pendency - - the parties respectfully urge the Presiding Judge to issue expeditiously an Initial Decision adopting the Proposed Findings of Fact and Conclusions of Law.

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I. Preliminary Statement

1. By *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing*, 13 FCC Rcd 10662 (1998), ("*OSC*"), the Commission commenced this proceeding to determine whether the licenses of Hicks Broadcasting of Indiana, L.L.C. ("*Hicks/Indiana*"), for Station WRBR(FM), South Bend, Indiana, and of Pathfinder Communications Corp. ("*Pathfinder*") for Station WBYT(FM), Elkhart, Indiana, should be revoked. The *OSC* specified the following issues with respect to Hicks/Indiana:

1. To determine whether [Hicks/Indiana] misrepresented facts and/or lacked candor, in its application (including all amendments) to acquire the license for Station WRBR(FM), regarding its present or future ownership or control in violation of Sections 73.1015 and/or 73.3514 of the Commission's Rules.
2. To determine whether [Hicks/Indiana] abdicated control of Station WRBR(FM) to [Pathfinder] and/or its agents or principals in violation of Section 310(d) of the Communications Act of 1934, as amended.
3. To determine whether, in light of the evidence adduced under the foregoing issues, [Hicks/Indiana] possesses the requisite qualifications to be or remain the licensee of Station WRBR(FM).

The *OSC* also specified the following issues with respect to Pathfinder:

4. To determine whether John Dille III misrepresented facts and/or lacked candor in the application of [Hicks/Indiana] to acquire the license for Station WRBR(FM).
5. To determine whether [Pathfinder] and/or any of its agents, including, but not limited to John Dille III, was the undisclosed real party-in-interest in the application of Hicks/Indiana to acquire the license for Station WRBR(FM), in violation of Section 73.3514 of the Commission's Rules.
6. To determine whether [Pathfinder] and/or its agents, including, but not limited to John Dille III, acquired control of Station WRBR(FM) without Commission authorization in violation of Section 310(d) of the Communications Act of 1934, as amended.
7. To determine whether, in light of the evidence adduced under issues 2, 5 and 6, [Pathfinder] and/or its agents -- including, but not limited to John Dille III -- owned, operated or controlled interests in violation of Section 73.3555(d)(2) of the Commission's Rules.
8. To determine whether, in light of the evidence adduced under the foregoing issues,

Pathfinder possesses the requisite qualifications to be or remain the licensee of Station WBYT(FM).

2. The *OSC* further stated in ¶ 65 that, irrespective of whether the hearing record warranted an order revoking the license of Hicks/Indiana for Station WRBR(FM), it should be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether a forfeiture in an amount not to exceed 250,000 dollars should be issued against Hicks/Indiana for violations of Sections 73.1015 and/or 73.3514 of the Commission's Rules and/or Section 310(d) of the Communications Act of 1934, as amended. Likewise, the *OSC* in ¶ 66 ordered that, irrespective of whether the hearing record warranted an order revoking the license of Pathfinder for Station WBYT(FM), it should be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether a forfeiture in an amount not to exceed \$250,000 should be issued against Pathfinder for violations of Sections 73.1015 and/or 73.3514 and/or 73.3555(d)(2) of the Commission's Rules and/or Section 310(d) of the Communications Act of 1934, as amended.¹

3. Pursuant to ¶ 56 of the *OSC*, the Bureau had the burdens of proceeding and proof with respect to all issues.

4. Hearing sessions were held in Washington, D.C. on October 6, 1998, and from October 20 through 27, 1998, and from November 2 through 9, 1998. The record was closed on November 9, 1998. *Order*, FCC 98M-124, released November 13, 1998; Tr. 2293-4.

¹ The *OSC* also specified an issue to determine whether Pathfinder possessed the basic qualifications to acquire the licenses for Stations WNDU(AM/FM), South Bend, Indiana from Michiana Telecasting Corp. However, because the applications to assign those licenses were dismissed by the parties, the Presiding Judge deleted that issue.

II. Proposed Findings of Fact

Background

5. In *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992) ("*Radio Revision*"), *recon. granted in part*, 7 FCC Rcd 6387 (1992), *further recon.*, 9 FCC Rcd 7183 (1994), the Commission modified its multiple ownership rules to permit increased ownership of broadcast radio stations by any one person. In radio markets with 14 or fewer commercial radio stations, a party was allowed to own up to three radio stations, no more than two of which could be in the same service, provided that the owned stations, if other than a single AM and FM station combination, represented less than 50 percent of the stations in the market. In larger radio markets, a party was allowed to own between four and six radio stations, provided that the combined audience share of the stations did not exceed 25 percent. 47 C.F.R. § 73.3555(a) (1992). In its order, the Commission also addressed issues raised by the use of joint ventures other than local time brokerage. Specifically, the Commission concluded that certain joint venture arrangements, including those involving joint advertising sales and shared technical facilities, generally strengthened the radio industry by providing stations that were not commonly owned with economies similar to those available to commonly owned stations. *Radio Revision*, 7 FCC Rcd at 2784-87. *See also*, Tr. 1317-21. The Commission did not modify the daily newspaper cross-ownership rule, which prohibited grant of a license for an AM, FM or TV broadcast station license where the party seeking the license owns, operates or controls a daily newspaper in certain specified areas. 47 C.F.R. § 73.3555(c) (1992). Also, the Commission did not modify its basic policies for determining *de facto* control of a broadcast licensee. *Radio Revision*, 7 FCC Rcd at 2787. *See also*, *Trinity Broadcasting of Florida, Inc.*, 8 FCC Rcd 2475 (1993).

Joint Sales Agreement

6. In the summer of 1992, Robert Ridder ("Ridder"), on behalf of John L. Booth, II ("Booth"), president of Booth American Company ("Booth American"), approached John F. Dille, III ("Dille"), president of Pathfinder, to determine whether the latter would be interested in a joint sales arrangement for their respective stations in the South Bend/Elkhart, Indiana area, namely, Booth American's WRBR(FM) and Pathfinder's WLTA(FM). Tr. 2224. The basic idea was to take advantage of the expanded opportunities provided by *Radio Revision*. The stations would combine their sales staffs under one general sales manager and eliminate certain associated administrative positions, thereby reducing each station's costs and increasing sales. Tr. 482, 2225-6. In this regard, each station had been struggling. WLTA(FM) had been a mediocre performer, while WRBR(FM) had lost more than \$500,000 for the years 1991 and 1992. MMB Ex. 5; Tr. 518-20, 2225. After several months of negotiations, the parties combined sales operations in September 1992. Tr. 1049, 2226. Several months later, on December 18, 1992, they executed a Joint Sales Agreement ("JSA"). MMB Exs. 1, pp. 14-30; 2, p. 3; Tr. 2226-7.

7. The JSA specified that the joint venture ("Venture") would operate under the name of Radio One Marketing of Michiana. MMB Ex. 1, p. 15. With one exception, all of the Venture's workers were to be employees of Pathfinder and subject to Pathfinder's discipline and supervision. *Id.* at pp. 15-6. The JSA called for a management committee of four members, two from Booth American and two from Pathfinder. *Id.* at p. 16. During the first year of operations, each party was responsible for 50% of the Venture's expenses and entitled to 50% of its revenues. Thereafter, a formula that relied upon specified Arbitron data would determine each party's share of revenues and expenses. *Id.* at p. 17A. The JSA further specified that Pathfinder would pay Booth American on or about the 55th and 70th days

following a month when revenues exceeded expenses. When expenses exceeded revenues, Booth American was to reimburse Pathfinder only if the amount exceeded \$5,000. When the amount was less than \$5,000, Pathfinder was to offset that amount against Booth American's share of the following month's revenues *Id.* at p. 18. The Venture's revenues, prior to disbursement to Booth American, were to be held in such accounts as the management committee deemed appropriate. *Id.* The JSA designated Pathfinder as the Venture's accountant. *Id.* at p. 19. During their partnership, Pathfinder and Booth American followed the provisions governing the accounting, allocation and distribution of revenues and expenses. Tr. 489-92, 679-80, 1062-3, 1068-9

8. Although the JSA called for the combining of the stations' sales forces and efforts, it also clearly sought to ensure that the licensees maintained control over their respective stations. Thus, Booth American and Pathfinder were each to have full authority over its own station's operations, and each was to bear full responsibility for its station's compliance with the Communications Act and the Commission's rules. Further, each was to employ, at its expense, management level employees to direct day-to-day operations of its own station. All management level employees of a party were to "report to and be accountable to such party exclusively." Sec. 6.2 (b) of the JSA. Booth American and Pathfinder were each to retain complete control over its own station's rate card, programming and promotions. MMB Ex. 1 at p. 20. In practice, Booth American and Pathfinder generally followed the provisions of the JSA. Tr. 482-4, 489-92. In this regard, Booth American maintained a separate programming staff and employed a general manager, Vince Ford ("Ford"), to oversee WRBR(FM)'s operations, other than sales. Tr. 483-4.

9. The JSA did not work as the parties had envisioned. While cost savings were apparent, revenues decreased, due in large part to the departure of most of Booth American's

sales persons. Tr. 2229-31. Thus, instead of improving the stations' bottom lines, the JSA, initially, had the opposite effect. Tr. 520, 1070-1. By memo dated April 15, 1993, Dille informed Booth that WLTA(FM)'s losses had increased from \$37,154 to \$178,271. Dille also reported to Booth that WLTA(FM)'s revenues were down 47% even though first quarter revenues for the entire market were up 10%. Dille noted that neither Steve Ruby, a Pathfinder employee, nor Ford, Booth American's employee, had produced the results hoped for by the parties. MMB Ex. 6, p. 2; Tr. 2233-5, 2302.

10. Notwithstanding the obvious problems with the Venture, Dille wished to continue with the JSA because he believed that the cost savings from joint sales operations were significant and would continue and because he believed that the stations' revenues would eventually increase. Tr. 2302. To that end, he proposed that a replacement be sought for the general sales manager's function for the Venture. He also suggested that Booth consider additional cost-savings measures, such as co-locating the facilities of WRBR(FM) and WLTA(FM) and employing a common general manager. MMB Ex. 6, pp. 3-4; Tr. 2304. Dille also passed along observations made by others involved in different joint ventures; namely, that presentation of each station should be done separately and that there should be separate sales staffs with a common sales manager. MMB Ex. 6, p. 2.

Pathfinder's Effort to Acquire WRBR(FM)

11. Shortly after receipt of Dille's memo, Ridder informed Dille that Booth American wanted to sell WRBR(FM). MMB Ex. 2, p. 3; Tr. 486, 2235. While Booth American representatives contacted a number of regional prospects, including David Hicks² ("Hicks")

² Ridder, on behalf of Booth American, had offered to sell WRBR(FM) to Hicks for a purchase price of nearly \$1 million in cash, without seller financing. Hicks rejected the proposal. Tr. 1862-4.

and Niles Broadcasting, Inc. ("Niles"), licensee of WNIL(AM) and WAOR(FM), Niles, Michigan, it appears that only Pathfinder actually commenced negotiations with Booth American. Tr. 1862-6, 2236, 2241. Dille negotiated terms on behalf of Pathfinder, while Robert Watson ("Watson"), Pathfinder's chief financial officer, Secretary and Treasurer, provided advice. Tr. 496-7, 2238.

12. By June 1, 1993, Pathfinder and Booth American had reached an understanding as to the basic terms of a deal. Tr. 1516, 1518-9. On that date, Pathfinder's communications counsel, Alan Campbell ("Campbell"), faxed to Watson a draft Memorandum of Understanding ("MOU") concerning WRBR(FM). The draft MOU reflects a sales price for WRBR(FM) of \$660,000 (principal and interest); a \$50,000 deposit in the form of a promissory note; a promise to proceed expeditiously to negotiate and execute an Asset Purchase Agreement ("B/P-APA"); and a commitment to execute noncompetition and local marketing agreements. The proposed payment schedule called for no payments for the first six months following the signing of the B/P-APA; \$5,000 per month, due on first day of the 7th through 12th months following the signing of the B/P-APA; a \$105,000 payment at the closing; additional payments on the first day of the 13th through 33rd months following the closing; and a \$240,000 balloon payment on the first day of the 34th month following the closing. MMB Ex. 9; Tr. 496-8.

13. As they were concluding their negotiations for the sale of WRBR(FM), Pathfinder and Booth American ascertained that Pathfinder would have to obtain a waiver of the radio-newspaper cross-ownership rule (then Section 73.3555(c)(2) of the Commission's Rules) because the 1 mV/m contour of WRBR(FM) encompassed the entire community of Elkhart, where the *Elkhart Truth*, a daily newspaper in which Dille held an attributable interest, is

published.³ MMB Exs. 1, pp. 32, 54; 2, p. 3. Booth, however, did not want to wait to see whether the Commission would act favorably on such a waiver request. MMB Exs. 1, p. 54; 2, p. 4; Tr. 502-3, 1517, 2240. Indeed, it appeared that grant of a waiver was far from certain and might take some time. Tr. 1517, 2241. Consequently, in late June or early July 1993, Booth indicated to Dille that he would begin seeking other buyers for WRBR(FM). MMB Ex. 2, p. 4.

Dille Pursues Hicks as a Potential Buyer for WRBR(FM)

14. Hoping to find a way to preserve the JSA, Dille endeavored to locate a suitable substitute for Pathfinder as a buyer of WRBR(FM). MMB Ex. 2, p. 5; Tr. 2242. Dille considered several possibilities from among those previously contacted by Booth American, and he contacted Hicks, a broadcaster in Michigan, in July 1993. MMB Ex. 2, p. 4; Tr. 1866, 2242-3. Dille thought Hicks would be a good candidate for WRBR(FM) because he was an experienced broadcaster, close to Dille in age, and not a competitor in the South Bend/Elkhart area. MMB Ex. 1, p. 54. Dille and Hicks had become acquainted as a result of both having attended industry gatherings and having served in various capacities for the National Association of Broadcasters ("NAB"). Tr. 1866, 2035-6, 2242-4. Dille viewed Hicks as having a good character and reputation. Tr. 2298.

15. When Dille contacted Hicks, Pathfinder was the licensee of 9 radio stations: WTRC(AM)/WLTA(FM), Elkhart; WQHK(AM)/WMEE(FM), Fort Wayne; WCKY(AM)/WIMJ(FM), Cincinnati; WCUZ(AM-FM), Grand Rapids; and WQWQ(AM), Muskegon Heights, Michigan. Further, Dille, through Truth, held attributable interests in

³ In addition to being president of Pathfinder, Dille has at all times pertinent to this proceeding held an attributable interest in Truth Publishing Company ("Truth"), publisher of the *Elkhart Truth*. MMB Exs. 1, p. 32; 3, p. 83; Tr. 2221. Watson is also an officer and director of Truth as well as a director of Pathfinder. Tr. 478-80.

KQLL(AM), Tulsa and KQLL-FM, Owasso, Oklahoma. MMB Ex. 3, p. 82. Finally, Dille also held a 50% interest in JAM Communications, Inc. ("JAM"), licensee of WQHK-FM, Decatur, Indiana. Tr. 589-90, 647. Hicks was president and sole stockholder of Hicks Broadcasting Company ("HBC"), licensee of two radio stations, WKMI(AM), Kalamazoo and WKFR(FM), Battle Creek. At that time, Hicks was in the process of merging HBC into The Air-Borne Group, Ltd ("Air-Borne"), licensee of WRKR(FM), Portage, Michigan, which would result in Hicks holding slightly less than one-third of the voting stock of the surviving entity. MMB Ex. 3, p. 82; Tr. 83-4, 91-3, 1856.

16. On July 28, 1993, Dille met with Hicks and proposed that Hicks become the majority owner in an entity that would acquire WRBR(FM). MMB Ex. 4, pp. 4-5; Pathfinder Ex. 10, p. 1; Tr. 1870. While they have different recollections regarding the particulars of the meeting, they apparently discussed the JSA as well as some of the details of the deal Dille had worked out with Booth. Tr. 1872-5, 2245. Dille testified that he also raised the inclusion of his children as minority owners, and, possibly, their having the right, ultimately, to buy Hicks out. Tr. 2245-6. Although Hicks was interested in having further discussions with Dille about WRBR(FM), he did not initially commit himself to Dille's proposal. Tr. 1876.

17. Shortly thereafter, Dille contacted Hicks again. Tr. 2246-7. Although Hicks testified that he did not tell Dille that he would go forward with the WRBR(FM) project until early September, Dille, in mid-August, told Campbell that Dille (identified in the following memo as Dille, III) had found someone to acquire WRBR(FM). MMB Ex. 12; Tr. 1519-20, 2250. As Campbell understood the situation (as reflected in his August 17, 1993, memorandum to John Quale ("Quale"), Booth American's communications counsel):

"[A] new entity, Newco, would be formed to acquire WRBR. There would be a single majority shareholder who is not related to Dille, III. The majority shareholder is an experienced radio broadcaster who has no interests in the

South Bend or Elkhart markets. The three minority shareholders would be the three adult children of Dille, III (ages 26, 25 and 19).... Dille, III would not have any interest - attributable or nonattributable - in Newco." MMB Exs. 1, p. 32; 2, p. 5.

Campbell determined that Dille's idea of a single majority shareholder, with his children as non-attributable minority owners, would be acceptable to the Commission after discussing the idea with Quale and Larry Eads, then chief of the Mass Media Bureau's Audio Services Division. MMB Exs. 1, p. 54; 12; Tr. 1520-1. At about the same time, Dille also discussed his plan with Peter Tannenwald ("Tannenwald"), a communications lawyer then with the law firm of Arent, Fox, Kintner, Plotkin & Kahn (later with Irwin, Campbell & Tannenwald, P.C.). Tannenwald informed Dille that no waiver of the Commission's rules would be needed if the buyer had a single majority shareholder and Dille's children held non-attributable interests. Tr. 1426-7, 2242.

18. On the same day that Campbell sent his memorandum to Quale, Dille sent a "Note to John Booth" ("Note") concerning WRBR(FM). The Note stated in pertinent part:

"As we have discussed, Dave Hicks, a broadcaster in Kalamazoo, has indicated his intent to become the controlling interest in an entity that would acquire WRBR. As we have also discussed my three children would each hold a third of minority shares.

They would have an arrangement-option-agreement to purchase from Hicks his shares when and if that became possible. Their ages are 26, 25 and 20.

It would be prudent for NEWCO to have a JOA or some kind of agreement with someone. Clearly WLTA would be the likely choice. And that agreement would have an element of risk within it so as to ensure careful attention to the obligations of the business as well as the license. These things together should provide for an "arm's length" agreement.

The above along with the de minimis nature of the encroachment on the rules should make any request, if necessary, for a waiver fairly straightforward. Perhaps such a waiver is not a slam dunk, but relative to Bakersfield it ought to be quite "doable".

Clearly, we would like to proceed. We see it as a reasonable business deal and a help to both stations as they position for the future....

By now you should have some kind of document from Alan Campbell regarding the governance of NEWCO that will furnish what we need to

proceed. MMB Exs. 1, p. 31; 2, pp. 4-5.

19. Dille explained that his purpose in sending the Note was to update Booth on Dille's progress with Hicks. In this regard, Dille did not want Booth to think about selling the station to anyone else. Tr. 2248. Notwithstanding the assertions in the first and second paragraphs regarding Hicks and an "arrangement-option-agreement," Dille testified that Hicks had not even committed to participate in the transaction, much less agreed to an arrangement for the disposition of his interests. Tr. 2248-9, 2338-40. Hicks likewise testified that, as of August 17, 1993, he had made no agreement and formed no intent either to purchase WRBR(FM) or to give the Dille children an option to acquire his interest. Tr. 1935-6, 2068.

20. Dille did not send to Campbell or Hicks the Note sent to Booth, and Hicks did not see the document until December 1995. Nor did Dille inform either of them at that time that he desired an "arrangement-option-agreement" for his children to be able to purchase Hicks' interest. Tr. 1559, 2330-1. However, consistent with his communications with Campbell and Booth and in order to keep negotiations moving forward, Dille had Watson send to Booth American's attorneys proposed changes to draft documents concerning the WRBR(FM) sale. Among other things, Watson related that "the purchaser will not be related to Pathfinder Communications Corporation; the corporate name is still yet to be established." MMB Ex. 13. At this point, Watson understood that he was acting on behalf of Dille's children; however, all such activities occurred during his normal work day, and he received no extra compensation from Pathfinder or from the Dille children. Tr. 505-6.

Hicks Decides to Participate

21. Dille met with Hicks again on September 2, 1993. Pathfinder Ex. 10, p. 2; Tr. 1877-8, 2253. At this meeting, Dille provided Hicks a sketch as to how the JSA worked. Pathfinder Ex. 67; Tr. 1880, 2252-3. Hicks and Dille also discussed whether a JSA was

permitted by the Commission, whether, and if so, what further combinations of operations could occur, and whether Hicks was amenable to the participation of Dille's children as minority investors. Tr. 1882-3, 1886-7. Dille also provided to Hicks for the first time detailed information regarding the price and terms he had negotiated with Booth. Tr. 1885. Hicks further testified that, at that time, he had no agreement with Dille to move forward and attempt to acquire WRBR(FM) or to give Dille's children an option to acquire his interest. Tr. 1888. Finally, while he was not certain, Hicks acknowledged that the Dille children's future ownership of his interest could have been one of Dille's long list of wishes that was raised at the meeting. Tr. 1887.

22. Subsequent to his meeting with Dille, Hicks wrote to Booth to

"confirm my interest in the purchase of Radio Station WRBR in South Bend.... My intentions would be to form a [sic] Indiana corporation under Sub-S status with Mr. Dille's children.... Mr. Dille informs me that there is now in place a selling agreement with Radio Station WLTA and that this agreement provides an incentive for either station to perform well as revenues would be tied to audience shares. We feel it would be important to continue this agreement.... If my interest is acceptable to you I would ask that contracts or other agreements necessary for my consideration be forwarded to me as soon as possible. Please also inform me of any additional information that I may need to supply to you." MMB Ex. 15; Tr. 1889-90.

Hicks explained that he wanted Booth to know that he was interested in acquiring WRBR(FM) and having the JSA continue. Tr. 1890-1. Hicks' letter was not intended to reflect a commitment to buy the station but to communicate that he was an interested party. Hicks did not view WRBR(FM) as a "big deal;" rather, he perceived the project as a chance to do something creative and fun. Tr. 2073.

23. Approximately one week later, Hicks formally engaged Eric V. Brown, Jr. ("Brown"), a Michigan attorney, to assist him in negotiations with Booth American and in drafting documents related to the WRBR(FM) acquisition. MMB Ex. 18, p. 1; Tr. 1746-7,

2078. Hicks viewed Brown as a negotiator, document provider and counselor. Tr. 1895.

Hicks had known Brown for approximately ten years. Tr. 1626, 1893. In addition to their business dealings, they were social friends. Tr. 1633, 2079-80.

24. Concurrent with his decision to go forward with negotiations concerning WRBR(FM), Hicks closed on a merger of his solely-owned HBC with Air-Borne on August 31, 1993. After the merger, the entity was renamed the Crystal Radio Group, Inc. ("Crystal"). Although Hicks had brought to the merger two of the three stations (*see* ¶ 15, *supra*) he held slightly less than 1/3 of Crystal's stock after the merger. In this regard, Hicks' stations had a substantial amount of debt compared to Air-Borne's station. Tr. 92, 1939, 2032-3. Hicks and Brown, who had been a director of HBC and its corporate counsel, became directors of Crystal. Crystal's four other directors came from Air-Borne. Brown also took on the role of corporate counsel for Crystal. Tr. 94, 165, 1732, 1956.

25. Sometime between August 31, 1993 and September 28, 1993, Dille stopped by the Crystal offices to talk with Hicks. While there, Dille was introduced to Hicks' new business associate, Edward Sackley, III ("Sackley"), who was also one of Crystal's directors. Tr. 1941-3. Dille told Sackley about Hicks' role in the possible acquisition of WRBR(FM). Sackley testified that, after further discussions with Hicks, it was his understanding that Hicks was going to acquire the station on Dille's behalf and transfer it to Dille at a later date. Tr. 94-9.

26. Sackley was so concerned about the matter that he prepared a related item for the agenda for Crystal's board of directors first meeting, which was held on September 28, 1993. The agenda item stated:

"Outside Ownership and/or Quasi-Ownership of Additional Broadcast Properties - Dave has indicated that discussions have taken place involving possible involvement by him, personally, in the transfer and assignment of the

license of another broadcast facility or facilities. This would be undertaken in connection with a planned subsequent transfer to a third party. The President requests that full details regarding any such activity, planned or actual, be provided on a regular basis and that the opinion of an FCC attorney be obtained by Dave, at no cost to CRG. That opinion, and a review period of no less than 3 business days, must be provided before Dave enters into any written or oral agreement or option. Indeed, such notification and legal opinion should be required of any CRG officer, director or shareholder contemplating any outside broadcast transaction. **DISCUSSION AND BOARD RECOMMENDATION REQUESTED.**" MMB Ex. 23, p. 12.

Sackley testified that his primary concerns at this stage were Hicks' potential financial and time commitments. In this regard, he and Hicks were personally responsible for Crystal's debt of several million dollars, and Sackley did not want Hicks becoming involved with another station which might divert Hicks' attention from his duties to Crystal. Tr. 92, 96, 105, 1760, 1778, 2049.

27. Notwithstanding Sackley's concern, the minutes (as opposed to the agenda) of the Crystal meeting reflect only that, with respect to outside ownership, "[t]he Board briefly discussed its expectation that outside broadcast business interests by CRG employees be disclosed to and reviewed by the Board." MMB Ex. 23, p. 15. Hicks did not dispute the accuracy of the agenda or the minutes relative to his proposed ownership of WRBR, but he denied that either he or Dille had told Sackley that Hicks would hold the station only until Dille could acquire it. Tr. 1943-4, 2038-43, 2047-8. According to Brown, the Crystal board's discussion concerning Hicks' proposed participation in the acquisition of WRBR(FM) lasted about five minutes. Tr. 1733-4. Brown believed that the minutes accurately reflected what was discussed. Tr. 1734.

28. In the meantime, Hicks, along with Dille and Watson, had received a set of the most recent draft documents from Booth American's attorneys. MMB Ex. 16; Tr. 507. Hicks took his set to Brown. From his review of the situation with Hicks on September 20, 1993,

Brown learned that Dille could not acquire WRBR(FM) without a waiver; that Pathfinder and Booth American had a joint operating agreement (the JSA); and that Hicks believed he could pay the station's purchase price of \$660,000 out of the revenues derived from the JSA. Tr. 1634-7; MMB Ex. 19, p. 1. Brown's notes reflect that Hicks informed Brown that Hicks would own 52% of the entity acquiring WRBR(FM); that Dille would basically operate the station while Hicks would be responsible for two or three employees; and that Hicks would have to put up a letter of credit for his share of the \$50,000 deposit. *Id.*, pp. 2-3. Brown further understood that if Hicks did not acquire the station, Booth American would likely sell WRBR(FM) to someone who could operate it as part of a duopoly. *Id.*, p. 3; Tr. 1681-6.

29. On September 21, 1993, Brown spoke with Dille. Tr. 2254. Brown's notes of the conversation reflect Dille's rendition of a brief history of regulatory changes regarding ownership. Brown was also informed about the JSA, Dille's inability to acquire WRBR(FM) absent a Commission waiver, Booth's decision not to wait for the outcome of a waiver request, and Dille's desire to protect the interests of his three children. Pathfinder Ex. 13; Tr. 1692-4.

30. On September 22, 1993, Brown met with Hicks and Dille, together. Tr. 1696-1704, 1897-8, 2254-5. At that meeting, Brown learned that Campbell was representing Dille. Brown was informed that the proposed deal had "been discussed with the FCC and blessed." MMB Ex. 21, p. 1. In this regard, Campbell had received assurances in late August 1993 from Larry Eads, then Chief of the Mass Media Bureau's Audio Services Division, that the Dille children could hold non-attributable interests in the buyer of WRBR(FM). MMB Ex. 12, p. 1; Tr. 1519-21.

31. Brown's notes also reflect "concerns," one of which was that the Dille "kids would buy David out. Would require waiver at present time." MMB Ex. 21, p. 1.

According to Hicks, Brown and Dille, no agreement then existed as to how and when any such acquisition would be accomplished. Tr. 1704, 1898-9, 2254-5. Moreover, although Brown viewed the children's future ownership as merely one of the options for Hicks to leave the entity, Brown acknowledged that no other options were discussed. Tr. 1697, 1766. With respect to an exit strategy, Brown's notes also reflect a "put," the price for which would either be \$50,000 or be based on a formula. MMB Ex. 21, p. 3. According to Hicks and Dille, no further discussion about an option for Dille's children occurred until March 1994. Tr. 1902, 2268-9, 2294.

32. Additional matters discussed by Dille, Hicks and Brown included Hicks' "Licensee - liability," which Brown understood to include programming, three or four employees including a general manager, and Hicks' time commitment, which was estimated at one morning per month at the station. MMB Ex. 21, p. 1, 3. The proposed payment schedule was noted by Brown. By now, the proposal called for no payments for six months after the closing. *Id.*, p. 2. Brown was also informed that Booth American would prepay the lease for WRBR(FM)'s studio and offices, thereby allowing Hicks and Pathfinder to combine the operations of WRBR(FM) and WLTA(FM). *Id.*; Tr. 1699. Finally, the parties worked out a procedure for revising draft documents, which included review by both Campbell and Brown. *Id.*, p. 3; MMB Ex. 22.

33. Thereafter, Brown reviewed draft documents and proposed suggestions on Hicks' behalf through the signing of the Asset Purchase Agreement ("APA") with Booth American on November 30, 1993. MMB Exs. 18, pp. 1-3; 25; 26; 27; 29; 31; Pathfinder Exs. 18-22; Hicks Ex. 10; Tr. 148-51, 1895. Dille and Watson continued to use Campbell to review drafts and propose suggestions on behalf of the Dille children. Campbell billed Pathfinder for the services rendered. MMB Exs. 17; 22; 24, p. 1; 32, p. 1; Tr. 515-7, 1527-8.

The APA

34. On November 30, 1993, Booth American and Hicks, as an agent for an Indiana limited liability company to be formed under the name Hicks Broadcasting of Indiana, L.L.C. ("Hicks/Indiana"), executed the APA. MMB Exs. 3, p. 26; 4, p. 5. The APA called for a seller-financed purchase price of \$660,000, with the first payment of \$5,000 to begin seven months after the closing. After five additional monthly payments of \$5,000, a \$105,000 payment was due on the first anniversary of the closing. After a year's grace period, 21 monthly payments of \$10,000 (later \$15,000) were required with the balance to be covered by a balloon payment of \$240,000. MMB Ex. 3, p. 65. The APA's payment schedule is virtually identical to the one described to Brown during his September 22, 1993, meeting with Hicks and Dille. *Id.*; MMB Ex. 21, p. 2.

35. Hicks/Indiana's obligation to pay the purchase price was backed up by a guaranty to be executed at the closing from Hicks and the Dille children totaling \$250,000. Per the guaranty, Hicks would be personally responsible for \$127,500, while each of the three Dille children would be responsible for one third of the remaining \$122,500. MMB Ex. 3, pp. 27, 66-9. The responsibilities of Hicks and the Dille children under the guaranty were personal, not joint and several; *i.e.*, Booth American had no right to seek money from any one individual in excess of that person's guaranty in the event one or more of the other guarantors were unable to pay. Tr. 643-4, 1654.

36. The APA also included an Escrow Agreement, which called for the deposit of \$50,000 -- \$24,500 from the Dille children and a letter of credit from Hicks in the amount of \$25,500. MMB Ex. 3, pp. 27, 70-6. Among other things, the Escrow Agreement provided that if closing occurred the cash portion of the escrow deposit would be returned to Hicks/Indiana. It further provided that if Hicks/Indiana paid Booth American a total of

\$105,000 in accordance with the payment schedule, the letter of credit would be returned. MMB Ex. 3, p. 71. Hicks obtained the letter of credit from the Michigan National Bank for \$510, which he paid by personal check. MMB Exs. 3, p. 77; 4, p. 5; Hicks Ex. 6, pp. 2-3; Tr. 1193-5. Although the checks used to fund the cash portion of the escrow came from the individual Dille children, the source of the funds contributed by them was Dille a fact known by Watson. MMB Exs. 1, pp. 33-7; 2, pp. 6-7; 34; Tr. 548. In this regard, Dille had previously learned from Tannenwald that he could loan money to his children if they held non-attributable interests in the WRBR(FM) owner. Tr. 1426-8, 2255-7. Hicks and Campbell were not told and did not know that Dille had provided the money to his children. Tr. 532, 1570, 1904-6, 2346; MMB Ex. 1, p. 54.

37. Under the APA, notices to Hicks/Indiana were to be sent to the attention of Hicks to a post office box in Elkhart, with a copy to Brown. *Id.*, p. 43. The post office box in Elkhart had been opened by Watson and was maintained by Pathfinder. Tr. 909; MMB Ex. 1, pp. 109, 111. Watson received a complete set of signed APA documents. Tr. 533; MMB Ex. 35.

38. On December 8, 1993, Brown made the following note to his WRBR(FM) transaction file regarding the letter of credit and the guaranty:

"We were advised by our client, David L. Hicks, that John F. Dille had agreed to hold him harmless with regard to any losses which might occur as a result of the Letter of Credit or Guaranty. Accordingly, we did not continue focusing on the various problems regarding those two documents and the possibility that David L. Hicks would be personally liable." MMB Ex. 36.

Brown's recollection is that the memo followed a telephone call he placed to Hicks. Brown called because he was concerned about the guaranty and the letter of credit, both of which created liabilities for Hicks. Brown testified that Hicks did not expressly tell him that Dille agreed to hold Hicks harmless; rather, those were Brown's words. However, Brown also

stated that Hicks told him not to worry about the letter of credit and guaranty because Dille would take care of it.⁴ Tr. 1729-30, 1796. Hicks allowed that he might have told Brown that the guaranty and letter of credit were nothing to worry about, but he could recall no conversation with Dille whereby Dille promised to hold him harmless. Tr. 1908, 2052-3. Dille testified that, prior to late March 1994 (see ¶ 60, *infra*), he had not agreed to indemnify or hold Hicks harmless in any respect in connection with the WRBR(FM) transaction. Tr. 2272-3. Watson was unaware of any plan to help Hicks meet his obligation under the guaranty if Hicks had to do so. Tr. 543.

The Hicks/Indiana Assignment Application and Dille statement

39. On December 22, 1993, Booth American and Hicks/Indiana filed an application to assign the license of WRBR(FM) (BALH-931222GE). MMB Ex. 3, pp. 14-84. The application represented that Hicks/Indiana was a limited liability company, with Hicks as president/CEO holding 51% of the vote and the three Dille children as minority principals holding the remaining 49% of the vote. None of the Dille children were to be officers or to have any other official function. *Id.*, pp. 17-18. The application included the APA, some, but not all, of the related schedules, and copies of the letter of credit and the Dille children's checks which funded the escrow. *Id.*, pp. 25-79. The application also informed the Commission of the Dille children's interests in Pathfinder and Truth, as well as the interests of Dille and of Dille's father, John F. Dille, Jr. in those entities. Finally, the application related that Booth American and Pathfinder were parties to a JSA and that Booth American's interests would be assigned to Hicks/Indiana. *Id.*, p. 83. Hicks certified the accuracy of the

⁴ Indeed, notwithstanding his memo to the file, Brown testified that he continued to be concerned about the issue and, ultimately, he prepared a document (the "Side Letter") intended to address his concerns. Tr. 1731. See also ¶ 60, *infra*.

information on behalf of Hicks/Indiana and submitted a personal check to cover the application fee, which was subsequently reimbursed by Hicks/Indiana *Id.*, pp. 13, 23; Hicks Ex. 6, p. 2; Tr. 1193-4.

40. The information in the Hicks/Indiana portion of the application came from Watson and Hicks. MMB Exs. 37; 38. Watson's contribution was Hicks/Indiana's Exhibit 2, which identified the Dille children, Dille, and Dille's father and described the interests of the Dille children. MMB Ex. 3, p. 83; Tr. 550. Hicks supplied the remainder of the information. MMB Ex. 37; Tr. 1911. Dille had no role in the assignment application. He did not see it either before or after its filing. Tr. 2258.

41. In response to Question 15 in Section II - Assignee's Legal Qualifications: "Are there any documents, instruments, contracts or understandings relating to ownership or future ownership rights (including, but not limited to, non-voting stock interests, beneficial stock ownership interests, options, warrants, debentures)?," Hicks decided that the answer should be "No." MMB Exs. 37, p. 8; 3, p. 20; Tr. 1915. In this regard, Hicks, Brown, Watson, Campbell and Dille testified that, at the time the application was filed and during its pendency, there was no agreement of any kind regarding the future ownership of Hicks' interest in Hicks/Indiana. Indeed, such an agreement was not reached until the end of March 1994 -- after the application had been granted -- when the "Operating Agreement" and the "Side Letter" were finalized. (See ¶¶ 58-60, *infra*). Tr. 1120-1, 1585, 1676, 1767-8, 1916, 2267-8; MMB Ex. 1, p. 90. As to whether or not there was an understanding regarding future ownership, Hicks, Dille and Brown acknowledged that discussions had occurred with respect to the Dille children's acquisition of Hicks' interest but each insisted that nothing was completely resolved until the "Operating Agreement" and "Side Letter" were signed. Tr. 1647-8, 1657, 1704, 1833-7, 1915-6, 2260, 2267-71; MMB Ex. 1, p. 90. Hicks insisted that,

notwithstanding any discussions regarding future ownership, he had intended to answer application question 15 truthfully, and, so far as he knew, he had done so. Tr. 2019.

42. In the application, Hicks also certified that Hicks/Indiana had "sufficient net liquid assets ... on hand or ... available from committed resources to consummate the transaction and operate the facilities for three months." MMB Exs. 3, p. 21; 37, p. 9; Tr. 1917-8. In this regard, Hicks viewed his personal assets as adequate to cover the station's expenses for the first three months of operation. Tr. 1918, 2101. Moreover, although the station had been losing money, Hicks believed that personnel cost savings resulting from automation and from co-locating the station with WLTA(FM) would allow him to operate the station with a minimal investment. Tr. 1902-5, 2029-31. Consistent with this idea, Hicks determined that the applicant would employ less than five full-time employees. MMB Exs. 3, p. 21; 37, p. 9; Tr. 1919-20. Hicks had not formulated a budget for the station at the time the application was filed. Tr. 775. Hicks also had no concrete information regarding the financial wherewithal of the Dille children. Tr. 1905-6

43. For the preparation, submission and prosecution of the WRBR(FM) assignment application and for all subsequent matters related to the Commission prior to the OSC, Hicks/Indiana chose to employ Campbell's firm - Irwin, Campbell & Crowe, P.C. (later Irwin, Campbell & Tannenwald, P.C.) - as its communications counsel. MMB Exs. 3, p. 12; 33; 37; 38; 40; 126; Tr. 1525-6, 1909-10. Although the formal attorney-client relationship was not established until December 21, 1993, Hicks had determined at least one month earlier to use Campbell in connection with the WRBR(FM) transaction. MMB Ex. 33; Tr. 2084-5. Hicks testified that although he was aware that Campbell had done work for Dille he understood that Dille was primarily represented by Tannenwald. Tr. 2085-6. Hicks paid Campbell's retainer from his own funds by a personal check dated December 22, 1993, which was subsequently

reimbursed by Hicks/Indiana. Hicks Ex. 6. Thereafter, Campbell's bills were paid by checks drawn by Pathfinder personnel pursuant to the Pathfinder-Hicks/Indiana accounting agreement. (see ¶¶ 62, 64, 104 *infra*). MMB Exs. 42; 44; 54; 126; Tr. 565, 574-5, 626, 982-9. Hicks chose Campbell as Hicks/Indiana's FCC counsel after having been introduced to him on the telephone by Dille. Tr. 1525. Hicks hired Campbell because his previous communications attorney had retired from practice and Campbell had a working knowledge of the JSA, the negotiations between Booth American and Pathfinder, and the discussions that had occurred with Commission staff concerning these matters. Tr. 1909-10.

44. Campbell put the WRBR(FM) assignment application into final form. MMB Exs. 38; 39; 40; Tr. 1529-30. Except for some matters not germane to this proceeding, Campbell did not discuss the application's answers with Hicks because he believed that Hicks was an experienced broadcaster who understood the application's questions. Tr. 1532, 1569-70. Campbell's only communication with Watson relating to the preparation of the application concerned the application exhibit which detailed the interests of the Dille children, Dille, and Dille's father. Tr. 550, 1529.

45. In January 1994, while the WRBR(FM) assignment application was pending, Sackley received a telephone call from Crystal's accountant, congratulating him on the acquisition of a new station. When Sackley asked what he was referring to, the accountant faxed him a page of Broadcast & Cable magazine, which contained a summary of the proposed purchase. MMB Ex. 23, p. 16; Tr. 105-6. Sackley thereafter confronted Hicks. Sackley was angry because, among other things, Hicks had not provided an opinion of counsel prior to entering into the transaction. Sackley thereupon asked Richard Zaragoza ("Zaragoza"), a Crystal shareholder and its communications counsel, to obtain a copy of the Hicks/Indiana application to acquire WRBR. Tr. 108-9.

46. The Crystal board discussed Hicks' proposed acquisition of WRBR(FM) at its January 28, 1994, meeting. Tr. 110. Sackley's recollection of the board meeting is that the members discussed every aspect of the proposed transaction, including ownership, rights to future ownership, financing and day-to-day management. Tr. 111. Sackley testified that he was particularly concerned that Question 15 of the application (concerning the existence of any agreement or understanding regarding present or future ownership rights) had been answered in the negative because that answer "flew in the face of everything we had been told ... regarding the planned subsequent transfer...." Tr. 115. Sackley recalled that Brown's response to his concern was that Question 15's "No" answer was appropriate because, at that point, there was no written agreement regarding future ownership and nothing was finalized. Tr. 115-7, 216-9. With respect to financing, Sackley related that Hicks explained that he had no out-of-pocket expenses and would not be contributing anything to the deal. Sackley further recalled that, in response to concerns about paying expenses in the event station revenues were insufficient, Hicks related that Dille would back him up. Tr. 113-4, 138-9, 221. Sackley also recalled that his father (also a Crystal director) called Hicks "stupid" because, at that time, Hicks had no written assurance that Dille would help financially if such help were needed. Tr. 221-2. Sackley testified that, as a result of the discussion, he was concerned about the truthfulness of the application's representation regarding future ownership and the impact such a representation might have on Crystal's licenses. Tr. 116.

47. Hicks' recollection of events differs from Sackley's in a number of respects. Hicks testified that the mood preceding the board meeting "was not harmonious and it was not a very pleasant meeting from the first issue all the way through." Tr. 1953. Hicks stated that he tried to explain to the Crystal board the exact plan for the WRBR(FM) transaction but had a "real hard time communicating" because of Sackley. Tr. 1953. In this regard, Hicks

related that Sackley was concerned about the effect of an infraction at South Bend on Crystal. Tr. 1954. To assuage that concern, Hicks testified that Brown offered to obtain an opinion from counsel about the possible impact of the WRBR(FM) transaction on Crystal. Tr. 1955. Hicks also indicated that, in response to concerns about his plans to operate WRBR(FM) and the amount of time he might have to devote, his plan was to have a general manager and to devote personal time after his normal work day in Kalamazoo. Tr. 1957-8. Hicks also acknowledged that questions were raised about his financial capabilities. Hicks stated he reacted sarcastically to a comment from Sackley's father about Dille's role in financing the operation in stating that Dille was "going to be at my door." Tr. 1958-9. Hicks then related that Sackley's father thought it "stupid" that Hicks did not have a signed agreement with Dille with regard to financing. Tr. 1959. With respect to the question of future ownership, Hicks denied that either he or Brown stated at the meeting that there was an agreement to sell the station to Dille or his children at some point in future. Tr. 1959-60. Hicks also testified that neither he nor Brown justified not disclosing an option in the assignment application because it had not been reduced to writing. Tr. 1960, 2099.

48. Brown related that, prior to the meeting, he learned that Sackley was concerned that Brown had not disclosed certain information about the WRBR(FM) transaction. Brown also understood that Sackley had charged Brown with a conflict of interest, which prompted Brown to propose resignation from the board. However, before Brown could resign, Sackley asked him not to because, according to Brown, Sackley wanted the merger to go forward.⁵ Immediately thereafter, the meeting occurred. Tr. 1739-41. Brown recalled that, during the

⁵ In this regard, Sackley also testified that he had raised conflict of interest concerns with Brown and that Brown had asked to resign prior to the meeting. Sackley further testified, however, that Brown did not resign because Sackley wanted Brown to attend the meeting and justify Hicks' application. Tr. 112-3.

meeting, there was a discussion regarding Hicks' obligations, specifically, the guarantee and the letter of credit, neither of which caused any concern among board members. Brown also related that a question was asked and a statement was made that Hicks' rights or what he could get out of the deal had not yet been agreed upon. In this regard, Brown testified that Sackley's father cautioned Hicks that he should be adequately compensated for what he was going to do. Tr. 1780-1.

49. The minutes of the meeting state as follows:

"Hicks Private Transaction. Dave explained the transaction recently filed with the FCC involving his 51% ownership of Hicks Broadcasting of Indiana, LLC, purchaser of WRBR, South Bend, Indiana, from Booth American Company. The Board reminded Dave of the previous instruction to furnish to Crystal Radio a legal opinion from an FCC attorney on the possible impact of the transaction on Crystal Radio. The Board also discussed the ramifications of WRBR having FCC violations, the possible need for an indemnification from Dave if so advised by legal counsel, and clarification that this activity was not to in anyway [sic] interfere with Dave's responsibilities at Crystal Radio. Dave acknowledged understanding of these points and agreed to arrange for Dick Zaragoza to review the transaction as soon as Hicks Broadcasting of Indiana completes a Shareholders Agreement between all of its owners. Eric Brown agreed to assist Dave with obtaining the opinion, which is not to be an expense of Crystal." MMB Ex. 23, p. 17.⁶

Except for the reference to being "reminded" about getting an opinion of counsel, both Brown and Hicks acknowledged that the minutes of the meeting accurately reflected what had been discussed. Tr. 1742, 1953, 2050-1.

50. Sometime in February 1994, Campbell received a telephone call from a member

⁶ By letter dated March 15, 1994, Brown sent a copy of the draft Operating Agreement to Zaragoza, in accordance with the commitment Hicks made at the January 28, 1994, Crystal board meeting to have FCC counsel review such an agreement. MMB Ex. 53. By letter dated March 21, 1994, Brown informed Zaragoza that the draft Operating Agreement was going to be amended to change the buy and sell provisions. MMB Ex. 55. After being informed by Zaragoza that he would not render an opinion on behalf of Hicks/Indiana, Brown requested that Campbell provide the opinion. MMB Ex. 60; Tr. 1580-1, 1811. Campbell did so by letter to Sackley dated March 31, 1994. MMB Ex. 23, pp. 21-23; Tr. 119-20.

of the FCC's staff. Tr. 1534, 1573-5. The staff person requested two "pieces of information in the form of amendments." MMB Ex. 1, p. 41. With respect to the future operation of WRBR(FM), Campbell related to Hicks that the staff wanted "a statement from John Dille and his father that they w[ould] not be involved in the day-to-day operation of WRBR and w[ould] not participate in the financing of the purchase of the station for John's children." *Id.* Other than Campbell's letter and the statement which Dille ultimately signed, there is no written record of exactly what it was that the staff requested. Tr. 1579, 2325-7.

51. Campbell did not discuss with the staff person the rationale behind the request. Tr. 1535, 1578-9. Indeed, in situations where a staff request is made, Campbell's practice is simply to try to supply the information requested in order to expedite the processing of the application. Tr. 1579. Campbell also did not discuss the staff's request or amendment with Hicks. MMB Ex. 44; Tr. 1923. As to why the letter's phraseology differed from the statement Dille signed (compare MMB Ex. 1, p. 41 with MMB Ex. 1, p. 40), Campbell explained that his letter to Hicks was only intended to alert him generally of the request and was not meant to reflect precisely what the staff had asked. Tr. 1538-9.

52. The letter from Campbell memorializing the staff's request was sent to Hicks on February 17, 1994, and reflected that a copy was to be sent to Watson. MMB Exs. 1, p. 41; 4, p. 7. However, both Dille and Watson testified that they never saw Campbell's letter to Hicks. Tr. 584, 2266. Further, while Campbell's statement of services reflects that he called Dille and Watson about a "WRBR amendment," Campbell and Watson did not recall any conversation about the specifics of the staff's request or the reasoning behind it. MMB Ex. 43; Tr. 585, 1576, 1578, 2266. Dille recalled merely that Campbell called him and told him and Watson that the Commission needed a statement regarding Dille's and his 80 year old father's non-involvement in financing and day-to-day operations of Hicks/Indiana. Tr. 2260-

1.

53. Initially, Campbell prepared a statement to be signed by both Dille and his father. However, after being informed by Dille that Dille's father was too ill to sign any such statement, Campbell revised the statement so that only Dille would sign it. Tr. 1535-6, 2261-2. The statement ultimately prepared by Campbell and signed by Dille on February 22, 1994, read as follows:

"I am the father of Sarah D. Dunkel, Alec C. Dille and John F. Dille, IV. I am aware that they are each proposing an ownership interest of 16.33% in Hicks Broadcasting of Indiana, L.L.C., which is proposing to acquire the above-captioned station. This is to advise the Commission that neither I nor my father, John F. Dille, Jr., will finance or guarantee the purchase of the station by Hicks Broadcasting. Moreover, upon acquisition of the station by Hicks Broadcasting, neither I, nor my father, will be involved in the day-to-day operation of the station." MMB Exs. 1, p. 40; 2, p. 7; Tr. 2262-3.

Campbell did not refer to Pathfinder in the statement because the staff had not asked for anything with respect to Pathfinder. Tr. 1539-40. These were the only revisions to the statement ever discussed or made. Tr. 1536-7, 2262.

54. Dille and Campbell did not discuss the implications of Dille already having furnished the money to fund the cash portion of the escrow. Tr. 2343. Indeed, Campbell did not know and had not asked where the Dille children had obtained those funds, and he also did not inquire how the Dille children would obtain funds in the future if such were needed to cover their commitment to Hicks/Indiana. Tr. 532, 1570. Dille testified that because of the advice he had previously received from Tannenwald that it was permissible for him to loan his children any funds they might need for their obligation to WRBR(FM) (see ¶ 36, *supra*), he believed the statement he signed did not preclude him from loaning or giving money to his children to fund any obligation they might have relative to Hicks/Indiana. Rather, he understood that he could not pay Booth American directly on behalf of Hicks/Indiana, and he

testified that, at that time, he had no intention of doing so or of guarantying such payment. Tr. 2263-4, 2345-7; MMB Ex. 1, pp. 54-55. Dille did not consider whether Pathfinder was affected by his statement inasmuch as it had been already reported in the application that Pathfinder was involved in WRBR(FM)'s sales because of the JSA. Tr. 2314-9, 2321-2.

55. Hicks and Dille did not discuss the statement. Tr. 2113, 2341. Ultimately, Hicks signed on February 23, 1994, and Campbell filed the next day, the amendment, which included Dille's statement. MMB Exs. 3, p. 85; 4, p. 7. It appears that Hicks did not receive and review Dille's statement until after it had been filed at the Commission. Tr. 1921, 1923-4. The statement raised no question in Hicks' mind as to its responsiveness to the staff's request or to its accuracy. Tr. 1924.

Organization of Hicks/Indiana

56. Upon submission of the requested amendment on February 24, 1994, Brown, Hicks, Watson and Dille knew that the application was ripe for grant. Tr. 2260-1. To ensure that the documentation governing Hicks/Indiana was prepared in a timely manner, Watson, at Brown's or Hicks' request, engaged Samuel Thompson ("Thompson") of Barnes & Thornburg, a South Bend law firm which had represented Pathfinder.⁷ Tr. 589, 1660; MMB Ex. 45, p. 2; 46, p. 2. Upon its completion in early March, a set of draft documents was sent by Dille (and supplemented by Watson) to Hicks, with a copy to Brown. MMB Exs. 18, p. 4; 50; Tr. 612-3, 1119, 1662. Ultimately, on March 23, 1994, John F. Dille, IV ("Flint Dille") executed Articles of Organization for Hicks/Indiana. MMB Ex. 59.

57. Brown's statement of services indicates that, from January 1994 through March

⁷ Brown explained that once it was decided that the company should be an Indiana limited liability company, he and his partners felt that an Indiana law firm should prepare the organizational documents. Tr. 1659. Brown also stated that he was familiar with Barnes & Thornburg and viewed it as a very good firm. Tr. 1660.

1994, discussions occurred with Hicks and, in some instances, Watson, about a "shareholders agreement." MMB Ex. 18, pp. 4-6. Brown's statement of services also reflects, however, that no one from his firm actually discussed the "Operating Agreement" with Indiana counsel until late March 1994. MMB Ex. 18, p. 6. Similarly, the statement of services from Barnes & Thornburg reflects that the first discussion with Brown's firm about an operating agreement occurred on March 29, 1994. MMB Ex. 45, p. 2.

58. The initial draft of the Operating Agreement of Hicks Broadcasting of Indiana, L.L.C. ("Operating Agreement") transmitted to Brown in early March 1994 did not include a "call" or "put" provision with respect to Hicks' interest. Pathfinder Ex. 65; Tr. 1662, 1831. On March 23-24, 1994, the draft Operating Agreement was revised at Dille's suggestion to include, *inter alia*, a "call" provision (new Sec. 7.4(b)), which would allow the Dille children, jointly, to acquire at any time Hicks' interest. Essentially, the price to be paid by the Dille children was proposed at five times Hicks' share of the station's cash flow, less Hicks' share of the station's debt,⁸ or \$50,000, whichever was greater. The language for the formula was derived from a December 1992 agreement Dille had with the other shareholders of JAM (see ¶ 15, *supra*). Pathfinder Exs. 32; 32A; 66; MMB Ex. 57; Tr. 589-90, 647, 2267-8. But for the proposed minimum price for Hicks' shares, neither Brown nor Hicks objected to the call provision. Tr. 649, 1667-9, 1927. Indeed, Brown was "looking for it" and was delighted to

⁸ According to a media broker, Charles Giddens, the multiple proposed was not unreasonable. Tr. 1338-9. Although Hicks opined that the formula was "fair" (Tr. 1931), Brown acknowledged that the formula was totally different from Hicks' arrangement with the other Crystal shareholders, which had no formula for determining a price for the purchase or sale of other shareholders' shares. Instead, the idea in the Crystal arrangement was that a potential buyer or seller would suggest a price which could be used to determine what he paid for others' shares or received for his own. Tr. 1790. Brown made no such proposal on behalf of Hicks. Tr. 1791. Brown could not say whether the formula in the call proposal offered on behalf of the Dille children would result in Hicks receiving fair market value for his interest. Tr. 1792-4.

get such a proposal. Tr. 1783, 1832-7.

59. On March 25, 1994, Watson transmitted the revised draft Operating Agreement to Brown. MMB Ex. 58. Hicks countered by changing the minimum price for his interest from \$50,000 to \$100,000. Pathfinder Ex. 66, p. 5; Tr. 1794, 1927, 2134. Subsequent drafts were authored by Brown and Stephen Stankewicz (on behalf of Hicks) and Thompson, J. Scott Troeger, Watson and Dille (on behalf of the Dille children). MMB Exs. 62; 64; 65; Tr. 687-9, 1794. The specific language governing the transfer of ownership in Hicks/Indiana was not agreed upon until March 31, 1994, the day of the closing on the sale of the WRBR(FM) assets from Booth American to Hicks/Indiana. Tr. 688-9, 1676. Brown understood that the Operating Agreement was structured so that Hicks would have to divest his interest whenever the Dille children wanted him out. Tr. 1788-9. The Dille children signed the Operating Agreement upon the advice of their father sometime in late April or early May 1994. MMB Exs. 3, p. 179; 79; 85; Tr. 737-8.

60. In addition to the Operating Agreement, Brown proposed by a letter dated March 30, 1994 (the "Side Letter"), three other provisions meant to govern the relationship between Hicks and the Dille children. First, Brown confirmed the amounts of the members' capital contributions. Second, Brown proposed that Hicks have a right to "put" his interest in Hicks/Indiana to the Dille children, which could be exercised at any time after three years. The cost to the Dille children would be the same as that agreed upon in the Operating Agreement in the event the Dille children chose to purchase Hicks' interest. Finally, Brown proposed that the Dille children hold Hicks harmless from any costs arising from the letter of credit Hicks had given to Booth American to fund his share of the escrow and that the Dille children agree to pay their respective shares of the guaranty in full before Hicks had to pay any amount on the guaranty. MMB Ex. 61; Tr. 635-7, 1673, 1725, 1821-4, 1932. After

determining that the guaranty commitment did not appreciably increase the Dille children's financial burden, Watson and Dille agreed to Brown's proposals and had the Dille children sign the Side Letter. MMB Ex. 2, pp. 9-10; Tr. 639-41, 2271-3. Campbell became aware of the existence and contents of the Operating Agreement and Side Letter in connection with the preparation of the first ownership report for Hicks/Indiana. In this regard, both the Operating Agreement and Side Letter were included with the ownership report which was filed at the Commission toward the end of April 1994. Tr. 1583-5.

61. Notwithstanding Hicks' majority share in Hicks/Indiana, Hicks did not have, nor did he ever seek, a right to call the Dille children's interests. Hicks' explanation for this was that he was already involved in Kalamazoo and that South Bend was going to be a "fun" project. Moreover, Hicks believed that the spirit of the deal was such that he was not concerned about somebody trying to remove him from ownership. Tr. 2135-6. As to why he needed an exit strategy for a company he would control, however, Hicks had no answer. Tr. 2138. According to Brown, Hicks had no reciprocal right to call the Dille children's shares because Brown did not think that having such a right provided a good exit for Hicks. Tr. 1726. In this regard, Brown never proposed that Hicks have a call right because Brown's focus was how Hicks could get out of the investment if such was his desire. Tr. 1784-6.

62. Concurrent with the preparation and transmission of organizational documents, Campbell and Watson discussed in early March 1994 "the extent to which the Accounting Department of Pathfinder ... could do the accounting services for HICKS." MMB Ex. 48, p. 2; 51; Tr. 596. Consistent with this discussion, Watson prepared a memo dated March 4, 1994 ("March 4 memo") which described the points upon which he and Campbell had agreed. The March 4 memo (with a minor change made by Campbell to item 6) provided:

"1) There will be a written agreement signed by David Hicks, majority